1935), and *State Highway Comm'n of Wyoming v. Utah Construction Co.*, 278 U.S. 194, 49 S. Ct. 104, 73 L.Ed. 262 (1929).

If the action is one against the state, jurisdiction is lacking for the reason that it has never been held that a state is a citizen for diversity purposes.

State Highway Comm'n of Wyoming v. Utah Construction Co., 278 U.S. 194, 49 S. Ct. 104, 73 L.Ed. 262 (1929)

Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 15 S. Ct. 192, 39 L.Ed. 231 (1894)

State Highway Comm'n in Ark. v. Kansas City Bridge Co., 81 F.2d 689 (8th Cir. 1936)

Pacific Fruit & Prod. Co. v. Oregon Liquor Control Comm'n, 41 F.Supp. 175 (D.C. Or. 1941)

Dunnuck v. Kansas State Highway Comm'n, 21 F.Supp. 882 (D.C. Kan. 1937)

Weyerhaeuser Co. v. State Roads Comm'n of Md., 187 F.Supp. 766 (D.C. Md. 1960)

There is no conflict which needs clarification between the *Farnsworth* case and *State Highway Comm'n of Wyoming v. Utah Construction Co.*

In *Farnsworth* the 5th Circuit merely applied the law as announced earlier by the Louisiana Supreme Court in *Saint v. Allen*, 172 La. 350, 134 So. 246, 248, that the Louisiana State Highway Commission was a distinct legal entity separate from the state. In the Wyoming case, this Court regarded the conclusion it reached as

being in harmony with decisions rendered by the Supreme Court of Utah, i.e., that the Commission was but the arm or alter ego of the state.

There only remains to be shown the relationship between respondent Oregon State Highway Commission and the State of Oregon itself, and the pronouncements by the Supreme Court of the State of Oregon. The District Court in its opinion traced the history[1] of the Oregon State Highway Commission and it will not be repeated here. Suffice it to say, here, that the Commission is part of the State Highway Department of the State of Oregon[2], contracts executed by the Commission are made in the name of the State[3], suits or actions must be prosecuted in the name of the State by and through the Commission[4], or against the State through

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[1] *DeLong Corp. v. Oregon State Highway Comm'n*, 233 F. Supp. 7 (D.C. Or. 1964)

[2] ORS 366.105 Highway department. The State Highway Department shall consist of the State Highway Commission, the State Highway Engineer, the Assistant State Highway Engineer, the Chief Counsel, the Secretary and all their employes or assistants.

[3] ORS 366.400 Execution of contracts; contractor's bond; counties as contractors. (1) The commission may enter into all contracts deemed necessary for the construction, maintenance, operation, improvement or betterment of highways or for the accomplishment of the purposes of this Act. All contracts executed by the commission shall be made in the name of the state, by and through the commission.

[4] ORS 366.375(1) . . . the commission may commence and prosecute to a final determination any necessary or appropriate suit or action for the state in the name of the state, by and through the commission . . .

ORS 30.310 Actions and suits by governmental units. A suit or action may be maintained by the State of Oregon or any county, incorporated city, school district or other public corporation of like character in this state, in its corporate name, upon a cause of suit or action accruing to it in its corporate character, and not otherwise, in the following cases:

(1) Upon a contract made with the public corporation.

(2) Upon a liability prescribed by law in favor of the public corporation.

(3) To recover a penalty or forfeiture given to the public corporation.

(4) To recover damages for injury to the corporate rights or property of the public corporation.

the Commission[1], all funds of the Commission are deposited with the State Treasurer[2], the State Treasurer is authorized to transfer funds from one account to another where any fund is insufficient[3], and lastly, the bonds authorized to finance the contract here in issue were general obligations of the State of Oregon.[4]

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[1] ORS 30.320 Actions and suits against governmental units. A suit or action may be maintained against any county and against the State of Oregon by and through and in the name of the appropriate state agency upon a contract made by the county in its corporate character, or made by such agency and within the scope of its authority, and not otherwise; provided, however, that no suit or action may be maintained against any county or the State of Oregon upon a contract relating to the care and maintenance of an inmate or patient of any county or state institution. An action or suit may be maintained against any other public corporation mentioned in ORS 30.310 in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such other public corporation.

[2] ORS 366.510 Turning over highway funds to State Treasurer. The Secretary of State and all other state officials charged with the collection of highway funds shall, upon the first of each month after collection, unless a different time is otherwise provided, turn the same over to the State Treasurer who shall enter such revenues in the account of the highway fund.

[3] ORS 293.310 Transfer and retransfer of money and credit among state funds. If there is insufficient money to the credit of any fund in the State Treasury to pay the obligations against such fund and there is money to the credit of one or more other state funds which is not then required to meet the respective obligations against such funds, the State Treasurer shall transfer so much as he deems advisable of such money standing to the credit of the funds having excess money to the fund having insufficient money if there are or will be moneys accruing to the borrowing fund or which can be transferred to it in like manner, as provided in this section, to enable a retransfer to be made of such moneys to the credit of the lending funds from which they were so transferred in time to meet the requirements of the lending funds; but unless conditions are such at the time when the original transfer of moneys is considered as to make sure that such retransfer can be so made, the original transfer shall not be made. All such transfers of money from lending to borrowing funds shall be retransferred to the lending funds when or before they are needed in the lending funds.

[4] ORS 367.385 . . . All bonds issued under ORS 367.365 to 367.430 shall contain a direct promise of the State of Oregon to pay the face value thereof. . . .

ORS 367.390 . . . The bonds and the appurtenant coupons shall be

The construction of the bridge is strictly a governmental function. The State can only act through its agents. In this instance, the Legislature has entrusted the construction of the bridge to its State Highway Department, a part of the executive branch of the State itself. Based on the so-called "Treasury test" or any other test, the defendant, and the real party in interest, in this instance, is the State of Oregon.

It was said in *Weyerhaeuser Co. v. State Roads Comm'n of Md.*, 187 F.Supp. 766 at 773 (D.C. Md. 1960):

> "When the State has not created a new agency, but has simply granted additional powers and duties to an existing agency, such as the State Roads Commission, no case has been cited which has sustained an action under 28 U.S.C.A. § 1332, and I have found none."

In *United Contracting Co. v. Duby*, 134 Or. 1, 9-28, 292 Pac. 309 (1930), the Supreme Court of Oregon considered this question at some length. It is true that at the time of the decision the statute did not provide for actions against the State, by and through its Highway Commission, on contract. The waiver of sovereign immunity from such actions does not detract, however, from the holding that the action against the Highway Commission was in effect an action against the State.

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negotiable in form and shall embody an absolute and unconditional promise of the State of Oregon to pay the principal of and the interest upon the bonds, when due, in any coin or currency which, at the time of payment, is legal tender for the payment of public and private debts within the United States of America.

See also:

Schradér v. Veatch, 216 Or. 105, 108-109, 337 P.2d 814 (1959)

Mohler v. Fish Comm'n, 129 Or. 302, 305, 276 Pac. 691 (1929)

Salem Mills Co. v. Lord, 42 Or. 82, 88-89, 69 Pac. 1033, 70 Pac. 832 (1902)

The situation alleged in the Petitioner's amended complaint is identical to that as shown in the following cases where actions instituted against a commission, or its individual members, were held to be an action against the State.

State Highway Comm'n of Wyo. v. Utah Construction Co., 278 U.S. 194, 49 S. Ct. 104, 73 L.Ed. 262 (1929)

State Highway Comm'n in Ark. v. Kansas City Bridge Co., 81 F.2d 689 (8th Cir. 1936)

Simmons v. South Carolina State Highway Dept., 195 F.Supp. 516 (D.C. E.D. S.C. 1961)

Stamey v. State Highway Comm'n of Kansas, 76 F.Supp. 946 (D.C. Kan. 1948)

Pacific Fruit & Prod. Co. v. Oregon Liquor Control Comm'n, 41 F.Supp. 175 (D.C. Or. 1941)

Dunnuck v. Kansas State Highway Comm'n, 21 F.Supp. 882 (D.C. Kan. 1937)

In some earlier cases this Court likewise held that where the only relief sought amounts to enforcement of a contract of the State, an action against State officers for such relief is in effect a suit against the State.

Ex Parte Ayers, 123 U.S. 443, 8 S. Ct. 164, 31 L.Ed. 216 (1887)

Hagood v. Southern, 117 U.S. 52, 6 S. Ct. 608, 29 L.Ed. 805 (1886)

Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908)

It is submitted that there is nothing shown herein which changes the inherent nature of the Oregon State Highway Commission. The statutes of the State provide for the Highway Commission's organization and function as an agency of the State and not as a separate entity apart from the State. It would be as well to say that the Commission is a separate entity in the operation of interstate ferries, as provided in ORS 384.305[6], as to

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[6] Operation of interstate ferries by highway commission, counties, cities, towns or ports. The state acting by and through the State Highway Commission, and any county, city, town or port of the State of Oregon adjoining or bordering on any interstate river or stream of water, is each and every one authorized to:

(1) Establish, maintain and operate ferry service in and to any adjoining state, and for such purpose may acquire by gift, purchase, lease, contract, agreement, condemnation or otherwise, real, personal and mixed property, rights, rights of way, approaches, licenses, privileges and easements, equipment and facilities in the State of Oregon or any adjoining state, necessary or convenient for the proper construction, maintenance and operation of any such ferry service or services; or

(2) Contract with others for the purpose of operating and maintaining such ferry service.

make the contention made by Petitioner here, where the bridge is to take the place of the ferries. All is a part of a governmental function, i.e., to carry out general supervision and control over all matters relating to state highways.

When the Commission so acts, it is the State itself. If it is the State herein, then diversity jurisdiction does not exist as the State is not a citizen within the contemplation of 28 U.S.C. § 1332.

CONFLICT WITH DECISION IN MARKHAM V. CITY OF NEWPORT NEWS

Petitioner also claims the opinion of the District Court and that of the Circuit Court of Appeals is in conflict with *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961). (Pet. Br. 9)

It is claimed that by enactment of ORS 30.320[*] the State has waived its sovereign immunity and consented to suit in the Federal Court. The decision in *Markham* is clear that the law of the State cannot enlarge or restrict the jurisdiction of the Federal Courts or those of any other state. It follows that ORS 30.320 can have

[*] ORS 30.320 Actions and suits against governmental units. A suit or action may be maintained against any county and against the State of Oregon by and through and in the name of the appropriate state agency upon a contract made by the county in its corporate character, or made by such agency and within the scope of its authority, and not otherwise; provided, however, that no suit or action may be maintained against any county or the State of Oregon upon a contract relating to the care and maintenance of an inmate or patient of any county or state institution. An action or suit may be maintained against any other public corporation mentioned in ORS 30.310 in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such other public corporation.

no effect on jurisdiction in this case. The Federal Court in determining its own jurisdiction must look to the Constitution and laws of the sovereignty which created it, not to any state statute.

The Eleventh Amendment to the Constitution of the United States provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This provision does not extend to cities and counties.

Cowles v. Mercer County, 1868, 7 Wall. 118, 74 U.S. 118, 19 L.Ed. 86

Lincoln County v. Luning, 1890, 133 U.S. 529, 10 S. Ct. 363, 33 L.Ed. 766

Chicot County v. Sherwood, 1893, 148 U.S. 529, 13 S. Ct. 695, 37 L.Ed. 546

Graham v. Folsom, 1906, 200 U.S. 248, 26 S. Ct. 245, 50 L.Ed. 464

Port of Seattle v. Oregon & Washington Railroad Company, 1921, 255 U.S. 56, 70, 41 S .Ct. 237, 65 L.Ed. 500

Hopkins v. Clemson Agricultural College of South Carolina, 1911, 221 U.S. 636, 31 S. Ct. 654, 55 L.Ed. 890

Dissenting opinion of Mr. Justice Cardozo in *Ashton v. Cameron County Water Improvement District No. One*, 1936, 298 U.S. 513, 542, 56 S. Ct. 892, 80 L.Ed. 1309

A state may consent to be sued in her own courts without waiving her immunity to suits in the Federal Courts.

Smith v. Reeves, 1900, 178 U.S. 436, 20 S. Ct. 919, 44 L.Ed. 1140

Chandler v. Dix, 1904, 194 U.S. 590, 24 S. Ct. 766, 44 L.Ed. 1129

Burrill v. Locomobile Company, 1922, 258 U.S. 34, 39, 42 S. Ct. 256, 66 L.Ed. 450 (dictum)

State Highway Comm'n of Wyoming v. Utah Construction Company, 1929, 278 U.S. 194, 49 S. Ct. 104, 73 L.Ed. 262 (dictum)

Great Northern Life Insurance Co. v. Read, Insurance Commissioner, 1944, 322 U.S. 47, 64 S. Ct. 873, 88 L.Ed. 1121

Ford Motor Co. v. Department of Treasury of Indiana, 1945, 323 U.S. 459, 65 S. Ct. 347, 89 L.Ed. 389

Kennecott Copper Corp. v. State Tax Commission, 1946, 327 U.S. 573, 66 S. Ct. 745, 90 L. Ed. 862

Petty v. Tennessee-Missouri Bridge Commission, 1959, 359 U.S. 275, 79 S. Ct. 785, 3 L.Ed.2d 804 (dictum)

Murray v. Wilson Distilling Co., 1909, 213 U.S. 151, 172, 29 S. Ct. 458, 53 L.Ed. 742

State statutes which are contended to waive the privilege of the Eleventh Amendment are strictly construed. At least, such a waiver must be clearly indicated

by legislative intent before such a construction can be made.

Parden v. Terminal Ry., 377 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964)

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276, 79 S. Ct. 785, 3 L.Ed.2d 804 (1959)

Ford Motor Co. v. Dept. of Treasury of State of Ind., 323 U.S. 459, 65 S. Ct. 347, 89 L.Ed. 389 (1945)

State Highway Comm'n of Wyo. v. Utah Construction Co., 278 U.S. 194, 49 S. Ct. 104, 73 L.Ed. 262 (1929)

Copper S. S. Co. v. State of Mich., 194 F.2d 465 (6th Cir. 1952)

Stamey v. State Highway Comm'n of Kan., 76 F.Supp. 946 (D.C. Kan. 1948)

Dunnuck v. Kan. State Highway Comm'n, 21 F.Supp. 882 (D.C. Kan. 1937)

The early case of *Interstate Construction Co. v. University of Idaho*, 199 Fed. 509 (D.C. Id. 1912), is illustrative of cases seeming to hold that where the statute consenting to suit fails to limit the jurisdiction of the tribunal, the consent is general and constitutes a consent to suit in the Federal Courts.

In *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 64 S. Ct. 873, 88 L.Ed. 1121 (1944), where the statute giving consent to suit merely stated "brought in the court having jurisdiction thereof," it was held that

such consent did not embrace Federal as well as State courts.

In *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 66 S. Ct. 745, 90 L.Ed. 862 (1946), the Consent Statute read: ". . . may bring an action in any court of competent jurisdiction. . . ." (90 L.Ed. at page 872) The Court applied a strict construction to the Consent Statute and held there was no clear declaration by the State to its consent to a suit in the Federal Court. See annotations, 88 L.Ed. 1132, 90 L.Ed. 869.

See also, *Chandler v. Dix*, 194 U.S. 590, 24 S. Ct. 766, 48 L.Ed. 1129 (1904).

The converse of the proposition has also been declared. Where the United States has given its consent to suit against itself, without more, suit in the State court is unauthorized.

Minnesota v. United States, 305 U.S. 382, 59 S. Ct. 292, 83 L.Ed. 235 (1939)

Stanley v. Schwalby, 162 U.S. 255, 16 S. Ct. 754, 40 L.Ed. 960 (1896)

It has been held to be immaterial that a State statute authorizes a school board to sue and be sued if no consent is given to a suit in the Federal Court. *O'Neill v. Early*, 208 F.2d 286, 289 (4th Cir. 1953).

In *Chicago R.I. & P.R. Co. v. Long*, 181 F.2d 295, 299 (8th Cir. 1950), it was contended that since the

statute read "any court of proper jurisdiction," the Federal District Court was included. In denying this construction, the Court held that waiver of immunity under the Eleventh Amendment must be by clear and express language.

Even where the State statute recognizes that there may exist some species of claims against the State which are cognizable in the Federal Courts, it has been held that this is insufficient to constitute a waiver of the Eleventh Amendment, or a consent to suit in the Federal Courts. *Copper S. S. Co. v. State of Mich.*, 194 F.2d 465 (6th Cir. 1952).

The Eleventh Amendment is political in nature and is a fundamental right of the State guaranteed under the Constitution. It is a limitation upon the Federal Government and a basic State right. A waiver of such a fundamental right is not lightly to be inferred but should be clearly expressed. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938).

Petitioners ask for clarification in *Markham*, but to succeed here they would have this Court overrule *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64 S. Ct. 873, 88 L.Ed. 1121 (1944) and *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 66 S. Ct. 745, 90 L.Ed. 862 (1946).

We submit that there has been no express or implied waiver of the Eleventh Amendment by enactment of the Oregon Legislature.

CONFLICT WITH THIS COURT'S DECISIONS IN PARDEN V. TERMINAL RY. AND PETTY V. TENNESSEE-MISSOURI BRIDGE COMMISSION

Petitioner claims that the decision rendered in *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 79 S. Ct. 785, 3 L.Ed.2d 804 (1959) and *Parden v. Terminal Ry*, 377 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964) by this Court conflicts with the decision below in our case.

In *Petty*, a bi-state agency of Tennessee and Missouri entered into an interstate compact for the operation of a bridge across the Mississippi River. The compact provided that the agency could sue and be sued in its own name. In granting consent to the compact (63 Stat. 930), Congress provided:

> "That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters, or any commerce between the States or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof."

It was held that the provision reserved jurisdiction of the Federal Courts and that by accepting it and acting under it, the interstate agency waived the privileges of the Eleventh Amendment.

It should perhaps also be noted that the *Petty* case

was brought under the Jones Act, 46 U.S.C. § 688, to recover for the death of a seaman. The Bridge Authority was sued as the seaman's employer. Such actions, of course, are within the express jurisdiction of the Federal Courts. 46 U.S.C. § 688.

In *Parden v. Terminal Ry.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964), an action was brought under the Federal Employers Liability Act to recover for injuries received while working on a State-owned railway. Action was brought in the Federal Court and it was held that the State had consented to the suit by engaging in interstate commerce by rail after the enactment of F.E.L.A.

It is to be noted that under the Jones Act, 46 U.S.C. § 688, and the F.E.L.A., 45 U.S.C. §§ 51-56, the cause of action itself has been created by Congress and original jurisdiction of the District Court provided for. While there was an express waiver in *Petty*, in *Parden* the Congressional power over the regulation of interstate railroads had previously been held to apply to State-owned railroads and hence an implied waiver was found.

United States v. California, 297 U.S. 175, 56 S. Ct. 421, 80 L.Ed. 567 (1936)

California v. Taylor, 353 U.S. 553, 77 S. Ct. 1037, 1 L.Ed.2d 1034 (1957)

Petitioner seems to contend (Pet. Br. 8) that a waiver of the Eleventh Amendment is effectuated when the

state enters upon a field, the regulation of which is reserved to the Federal Government, such as interstate commerce, navigable streams and interstate compacts. We submit that in *Petty* no suit could have been maintained against the state without the reservation in the compact, and that in *Parden* no action could have been maintained against the state without the enactment by Congress of the Federal Employees Liability Act, 45 U.S.C. 51-56.

In each instance we find that Congress has preempted the field and exercised its power over matters reserved to it. While it might be said that the building of a bridge across the Columbia River enters upon what is potentially Federal domain, suffice it to say that Congress has not yet sought to enter this field. It is not contended that anything done was in contravention of an Act of Congress or any regulation issued pursuant thereto. Until such time as Congress does attempt to regulate or control, the State is free to act. Nothing the State has done implies a waiver of the fundamental rights reserved to it by the Eleventh Amendment.

Moreover, in this particular instance Congress has specially consented to the construction of bridges over the navigable waters of the United States. (33 U.S.C. § 525)

As was said in *Dover v. Portsmouth Bridge*, 17 N. H. 200 (1845), and *Pac. Inter-Club Yacht Assn. v. Morris*, 197 F.Supp. 218 (D.C. N.D. Calif. 1960) App. Dis., 288 F.2d 886 (9th Cir. 1961), the State could completely obstruct the channel of the navigable river so long as the

same did not contravene action previously taken by the Federal Government.

Every agreement, such as the one with which we are concerned, need not have Congressional approval.

Virginia v. Tennessee, 148 U.S. 503, 518, 13 S. Ct. 728, 37 L.Ed. 537 (1893)

Duncan v. Smith, 262 S.W.2d 373 (Ky. 1953), 42 A.L.R.2d 754

The Constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified. Nor does the Constitution state when the consent of Congress shall be given, whether it shall precede or may follow the agreement made, or whether it shall be express or may be implied. *State ex rel. Baird v. Joslin*, 116 Kan. 615, 227 Pac. 543, 544 (1924).

It was said in the early case of *Wharton v. Wise*, 153 U.S. 155, 173, 14 S. Ct. 783, 38 L.Ed. 669, 674 (1894):

> ". . . The articles inhibiting any treaty, confederation, or alliance between the states without the consent of congress were intended to prevent any union of two or more states, having a tendency to break up or weaken the league between the whole. They were not designed to prevent arrangements between adjoining states to facilitate the free intercourse of their citizens, or remove barriers to their peace and prosperity; and, whatever their effect, such arrangements could not be the subject of complaint by the states making them until, at least, the congress of the confederation interposed objections to their adoption or enforcement, which was never done." (14 S. Ct. at p. 786)

The decision in *Petty* and *Parden* are not in conflict with the decision in our case below. They rest upon entirely different grounds. Waiver of the Eleventh Amendment is involved in our case and such cannot be found either by expressed provisions or by implication through conduct.

CONCLUSION

We submit the petition for a writ of certiorari should be denied.

Respectfully submitted,

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